

AMENDED IN SENATE APRIL 27, 2009

AMENDED IN SENATE APRIL 20, 2009

**SENATE BILL**

**No. 313**

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**Introduced by Senator DeSaulnier**

February 25, 2009

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An act to amend ~~Section~~ *Sections 62.5 and 3722* of the Labor Code, relating to workers' compensation, ~~and making an appropriation therefor.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 313, as amended, DeSaulnier. Workers' compensation: penalty assessments.

Existing law requires every employer, except the state, to secure the payment of workers' compensation. Existing law requires the Director of Industrial Relations to issue and serve on any employer that has failed to secure the payment of workers' compensation a stop order prohibiting the use of employee labor. Under existing law, at the time the stop order is issued and served, the director is required to issue and serve a penalty assessment order requiring the uninsured employer to pay to the director, for deposit into the State Treasury to the credit of the continuously appropriated Uninsured Employers Benefits Trust Fund, the sum of \$1,000 per employee employed at the time the order is issued and served. Existing law provides that in lieu of the aforementioned penalty assessment, at any time that the director determines that an employer has been uninsured for a period in excess of one week during the calendar year preceding the director's determination, the director may issue and serve a penalty assessment order that requires the uninsured employer to pay to the director, for deposit into the State Treasury to the credit of the Uninsured Employers Benefits Trust Fund, the greater of (1) twice the amount the employer would have paid in workers'

compensation premiums during the period the employer was uninsured or (2) the sum of \$1,000 per employee employed during the period the employer was uninsured.

This bill would increase the penalty assessment to \$1,500. ~~The bill would make an appropriation because the increased penalty assessment would be deposited in a continuously appropriated fund. The bill would specifically provide that any additional moneys collected as a result of the increase in the penalty assessments pursuant to the bill shall be deposited in the State Treasury to the credit of the Uninsured Employers Benefits Trust Fund, but that the moneys be available only upon appropriation by the Legislature.~~

~~The bill would also clarify that the director may issue and serve either of the above mentioned penalty assessments.~~

Existing law provides that if the employer is currently insured, or becomes insured during the period during which the above penalty is being determined, the amount an employer would have paid in workers' compensation premiums shall be calculated by prorating the current premium for the number of weeks the employer was uninsured.

Existing law provides that if the employer is uninsured at the time the above penalty is being determined, the amount an employer would have paid in workers' compensation premiums shall be calculated by applying the weekly premium per employee on file with the Insurance Commissioner to the number of weeks the employer was uninsured. Existing law provides that each employee of the uninsured employer shall be assumed to be assigned to the governing classification for that employer as determined by the director after consultation with the Insurance Commissioner. Existing law provides that if the employer contends that the assignment of the governing classification is incorrect, or that any employee should be assigned to a different classification, the employer has the burden to prove that the different classification should be utilized.

This bill would require that, if the employer is currently insured, or becomes insured during the period during which the above penalty is being determined, the amount an employer would have paid in workers' compensation premiums shall be calculated by prorating the current premium for the number of weeks the employer was uninsured within ~~the three-year~~ 3-year period immediately prior to the date the above penalty assessment is issued.

This bill would also provide that if the employer is uninsured at the time the above penalty is being determined, the amount an employer

would have paid in workers' compensation premiums shall be the product of the employer's payroll for all periods of time the employer was uninsured within the 3-year period immediately prior to the date the above penalty assessment is issued multiplied by a rate determined in accordance with regulation that may be adopted by the Labor Commissioner or, if none has been adopted, the average insurer rate per \$100 of payroll as reported in the most recent summary published by the rating organization designated by the Insurance Commissioner. The bill would delete the provisions regarding the governing classification to which each employee of an uninsured employer shall be assumed to be assigned.

Vote:  $\frac{2}{3}$ -majority. Appropriation: ~~yes~~-no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 62.5 of the Labor Code is amended to  
2     read:  
3     62.5. (a) (1) The Workers' Compensation Administration  
4     Revolving Fund is hereby created as a special account in the State  
5     Treasury. Money in the fund may be expended by the department,  
6     upon appropriation by the Legislature, for all of the following  
7     purposes, and may not be used or borrowed for any other purpose:  
8     (A) For the administration of the workers' compensation  
9     program set forth in this division and Division 4 (commencing  
10    with Section 3200), other than the activities financed pursuant to  
11    Section 3702.5.  
12    (B) For the Return-to-Work Program set forth in Section 139.48.  
13    (C) For the enforcement of the insurance coverage program  
14    established and maintained by the Labor Commissioner pursuant  
15    to Section 90.3.  
16    (2) The fund shall consist of surcharges made pursuant to  
17    subdivision (e).  
18    (b) (1) The Uninsured Employers Benefits Trust Fund is hereby  
19    created as a special trust fund account in the State Treasury, of  
20    which the director is trustee, and its sources of funds are as  
21    provided in subdivision (e). Notwithstanding Section 13340 of the  
22    Government Code, the fund is continuously appropriated for the  
23    payment of nonadministrative expenses of the workers'  
24    compensation program for workers injured while employed by

1 uninsured employers in accordance with Article 2 (commencing  
2 with Section 3710) of Chapter 4 of Part 1 of Division 4, and shall  
3 not be used for any other purpose. All moneys collected shall be  
4 retained in the trust fund until paid as benefits to workers injured  
5 while employed by uninsured employers. Nonadministrative  
6 expenses include audits and reports of services prepared pursuant  
7 to subdivision (b) of Section 3716.1. The surcharge amount for  
8 this fund shall be stated separately.

9 (2) Notwithstanding any other provision of law, all references  
10 to the Uninsured Employers Fund shall mean the Uninsured  
11 Employers Benefits Trust Fund.

12 (3) Notwithstanding paragraph (1), in the event that budgetary  
13 restrictions or impasse prevent the timely payment of administrative  
14 expenses from the Workers' Compensation Administration  
15 Revolving Fund, those expenses shall be advanced from the  
16 Uninsured Employers Benefits Trust Fund. Expense advances  
17 made pursuant to this paragraph shall be reimbursed in full to the  
18 Uninsured Employers Benefits Trust Fund upon enactment of the  
19 annual Budget Act.

20 (4) Any moneys from penalties collected pursuant to Section  
21 3722 as a result of the insurance coverage program established  
22 under Section 90.3 shall be deposited in the State Treasury to the  
23 credit of the Workers' Compensation Administration Revolving  
24 Fund created under Section 62.5, to cover expenses incurred by  
25 the director under the insurance coverage program. The amount  
26 of any penalties in excess of payment of administrative expenses  
27 incurred by the director for the insurance coverage program  
28 established under Section 90.3 shall be deposited in the State  
29 Treasury to the credit of the Uninsured Employers Benefits Trust  
30 Fund for nonadministrative expenses, as prescribed in paragraph  
31 (1), and notwithstanding paragraph (1), shall only be available  
32 upon appropriation by the Legislature.

33 (5) *Any additional moneys collected from penalties pursuant to*  
34 *Section 3722 as a result of the increase of those penalties pursuant*  
35 *to the amendments to Section 3722 made by the act that added this*  
36 *paragraph shall be deposited in the State Treasury to the credit*  
37 *of the Uninsured Employers Benefits Trust Fund for*  
38 *nonadministrative expenses, as prescribed in paragraph (1), and*  
39 *notwithstanding paragraph (1), shall be available only upon*  
40 *appropriation by the Legislature.*

1 (c) (1) The Subsequent Injuries Benefits Trust Fund is hereby  
2 created as a special trust fund account in the State Treasury, of  
3 which the director is trustee, and its sources of funds are as  
4 provided in subdivision (e). Notwithstanding Section 13340 of the  
5 Government Code, the fund is continuously appropriated for the  
6 nonadministrative expenses of the workers' compensation program  
7 for workers who have suffered serious injury and who are suffering  
8 from previous and serious permanent disabilities or physical  
9 impairments, in accordance with Article 5 (commencing with  
10 Section 4751) of Chapter 2 of Part 2 of Division 4, and Section 4  
11 of Article XIV of the California Constitution, and shall not be used  
12 for any other purpose. All moneys collected shall be retained in  
13 the trust fund until paid as benefits to workers who have suffered  
14 serious injury and who are suffering from previous and serious  
15 permanent disabilities or physical impairments. Nonadministrative  
16 expenses include audits and reports of services pursuant to  
17 subdivision (c) of Section 4755. The surcharge amount for this  
18 fund shall be stated separately.

19 (2) Notwithstanding any other provision of law, all references  
20 to the Subsequent Injuries Fund shall mean the Subsequent Injuries  
21 Benefits Trust Fund.

22 (3) Notwithstanding paragraph (1), in the event that budgetary  
23 restrictions or impasse prevent the timely payment of administrative  
24 expenses from the Workers' Compensation Administration  
25 Revolving Fund, those expenses shall be advanced from the  
26 Subsequent Injuries Benefits Trust Fund. Expense advances made  
27 pursuant to this paragraph shall be reimbursed in full to the  
28 Subsequent Injuries Benefits Trust Fund upon enactment of the  
29 annual Budget Act.

30 (d) The Occupational Safety and Health Fund is hereby created  
31 as a special account in the State Treasury. Moneys in the account  
32 may be expended by the department, upon appropriation by the  
33 Legislature, for support of the Division of Occupational Safety  
34 and Health, the Occupational Safety and Health Standards Board,  
35 and the Occupational Safety and Health Appeals Board, and the  
36 activities these entities perform as set forth in this division, and  
37 Division 5 (commencing with Section 6300).

38 (e) (1) Separate surcharges shall be levied by the director upon  
39 all employers, as defined in Section 3300, for purposes of deposit  
40 in the Workers' Compensation Administration Revolving Fund,

1 the Uninsured Employers Benefits Trust Fund, the Subsequent  
2 Injuries Benefits Trust Fund, and the Occupational Safety and  
3 Health Fund. The total amount of the surcharges shall be allocated  
4 between self-insured employers and insured employers in  
5 proportion to payroll respectively paid in the most recent year for  
6 which payroll information is available. The director shall adopt  
7 reasonable regulations governing the manner of collection of the  
8 surcharges. The regulations shall require the surcharges to be paid  
9 by self-insurers to be expressed as a percentage of indemnity paid  
10 during the most recent year for which information is available,  
11 and the surcharges to be paid by insured employers to be expressed  
12 as a percentage of premium. In no event shall the surcharges paid  
13 by insured employers be considered a premium for computation  
14 of a gross premium tax or agents' commission. In no event shall  
15 the total amount of the surcharges paid by insured and self-insured  
16 employers exceed the amounts reasonably necessary to carry out  
17 the purposes of this section.

18 (2) The regulations adopted pursuant to paragraph (1) shall be  
19 exempt from the rulemaking provisions of the Administrative  
20 Procedure Act (Chapter 3.5 (commencing with Section 11340) of  
21 Part 1 of Division 3 of Title 2 of the Government Code).

22 **SECTION 4.**

23 *SEC. 2.* Section 3722 of the Labor Code is amended to read:

24 3722. (a) At the time the stop order is issued and served  
25 pursuant to Section 3710.1, the director shall also issue and serve  
26 a penalty assessment order requiring the uninsured employer to  
27 pay to the director, for deposit in the State Treasury to the credit  
28 of the Uninsured Employers Fund, the sum of one thousand five  
29 hundred dollars (\$1,500) per employee employed at the time the  
30 order is issued and served, as an additional penalty for being  
31 uninsured at that time or issue and serve a penalty assessment order  
32 pursuant to subdivision (b).

33 (b) At any time that the director determines that an employer  
34 has been uninsured for a period in excess of one week during the  
35 calendar year preceding the determination, the director may issue  
36 and serve a penalty assessment order requiring the uninsured  
37 employer to pay to the director, for deposit in the State Treasury  
38 to the credit of the Uninsured Employers Fund, the greater of (1)  
39 twice the amount the employer would have paid in workers'  
40 compensation premiums during the period the employer was

1 uninsured, determined according to subdivision (c), or (2) the sum  
2 of one thousand five hundred dollars (\$1,500) per employee  
3 employed during the period the employer was uninsured. A penalty  
4 assessment issued and served by the director pursuant to this  
5 subdivision shall be in lieu of, and not in addition to, any other  
6 penalty issued and served by the director pursuant to subdivision  
7 (a).

8 (c) If the employer is currently insured, or becomes insured  
9 during the period during which the penalty under subdivision (b)  
10 is being determined, the amount an employer would have paid in  
11 workers' compensation premiums shall be calculated by prorating  
12 the current premium for the number of weeks the employer was  
13 uninsured within the three-year period immediately prior to the  
14 date the penalty assessment is issued. If the employer is uninsured  
15 at the time the penalty under subdivision (b) is being determined,  
16 the amount an employer would have paid in workers' compensation  
17 premiums shall be the product of the employer's payroll for all  
18 periods of time the employer was uninsured within the three-year  
19 period immediately prior to the date the penalty assessment is  
20 issued multiplied by a rate determined in accordance with  
21 regulation that may be adopted by the Labor Commissioner or, if  
22 none has been adopted, the average insurer rate per one hundred  
23 dollars (\$100) of payroll as reported in the most recent summary  
24 published by the rating organization designated pursuant to Section  
25 11734 of the Insurance Code.

26 (d) If upon the filing of a claim for compensation under this  
27 division the Workers' Compensation Appeals Board finds that any  
28 employer has not secured the payment of compensation as required  
29 by this division and finds the claim either noncompensable or  
30 compensable, the appeals board shall mail a copy of their findings  
31 to the uninsured employer and the director, together with a  
32 direction to the uninsured employer to file a verified statement  
33 pursuant to subdivision (e).

34 After the time for any appeal has expired and the adjudication  
35 of the claim has become final, the uninsured employer shall be  
36 assessed and pay as a penalty either of the following:

37 (1) In noncompensable cases, two thousand dollars (\$2,000)  
38 per each employee employed at the time of the claimed injury.

39 (2) In compensable cases, ten thousand dollars (\$10,000) per  
40 each employee employed on the date of the injury.

1 (e) In order to establish the number of employees the uninsured  
2 employer had on the date of the claimed injury in noncompensable  
3 cases and on the date of injury in compensable cases, the employer  
4 shall submit to the director within 10 days after service of findings,  
5 awards, and orders of the Workers' Compensation Appeals Board  
6 a verified statement of the number of employees in his or her  
7 employ on the date of injury. If the employer fails to submit to the  
8 director this verified statement or if the director disputes the  
9 accuracy of the number of employees reported by the employer,  
10 the director shall use any information regarding the number of  
11 employees as the director may have or otherwise obtains.

12 (f) Except for penalties assessed under subdivision (b), the  
13 maximum amount of penalties which may be assessed pursuant  
14 to this section is one hundred thousand dollars (\$100,000). Payment  
15 shall be transmitted to the director for deposit in the State Treasury  
16 to the credit of the Uninsured Employers Fund.

17 (g) (1) The Workers' Compensation Appeals Board may  
18 provide for a summary hearing on the sole issue of compensation  
19 coverage to effect the provisions of this section.

20 (2) In the event a claim is settled by the director pursuant to  
21 subdivision (e) of Section 3715 by means of a compromise and  
22 release or stipulations with request for award, the appeals board  
23 may also provide for a summary hearing on the issue of  
24 compensability.